Taylor's College Sdn Bhd v Ketua Pengarah Kesatuan Sekerja Malaysia & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-01–22 OF 2004
SURIYADI, ZAINUN ALI AND SULAIMAN DAUD JJCA
17 FEBRUARY 2009

Administrative Law — Judicial review — Certiorari — Application to quash decision of DTU to conduct membership check by membership verification rather than by secret ballot — Whether DTU failed to provide sufficient reasons for choosing membership verification — Whether DTU acted contrary to law—Trade Unions Act 1959 ss 9(5), 26(3)

Labour Law — Trade Union — Recognition — Claim for — Whether Union's claim for recognition was resolved

The appellant owned and operated a private college under the name of Taylor's College and employed approximately 208 academic staff. On 1 March 1999, the fourth respondent, a union of the employees of the appellant who had become its members, ('Union') was registered as a trade union. By way of its letter dated 28 September 1999 the Union sought recognition as a trade union from the appellant. On 28 October 1999 the appellant informed the Director General Industrial Relations ('DGIR'), the second respondent, that it could not accord recognition to the Union. The appellant then requested the DGIR, inter alia, to determine whether the Union was competent to represent its employees. On 16 December 1999, the DGIR requested the Director of Trade Union Selangor ('DTU'), the first respondent, to inquire into the competence of the Union in representing the employees of the appellant. The DTU replied that the Union was competent and on 29 January 2000, the DGIR in turn informed the appellant that the Union was competent to represent its employees at the time when it claimed recognition from the appellant. On 27 March 2000 the appellant requested a secret ballot be taken by the DGIR to verify whether the Union actually represented a majority of the employees of the appellant. The Union objected to the appellant's request for the membership check to be conducted by way of a secret ballot. The DGIR wrote to the DTU and directed the membership check to be conducted by way of membership verification. After conducting a membership check the DTU confirmed that as at the date of the claim for recognition the fourth respondent represented 71.51% of the employees.

Dissatisfied with the fact that the membership exercise was not carried out by secret ballot, the appellant filed an originating motion against the respondents for an order of certiorari under O 53 of the Rules of the High Court 1980 to quash the decision by the DTU. The appellant's application was dismissed and hence this appeal. In its appeal the appellant contended that the secret ballot method was fairer and democratic and that the DTU had not directed itself properly to the legal provisions pertaining to the issue of membership check and had failed to provide reasons for a membership exercise by way of membership verification. It further submitted that the DTU's decision was unreasonable because it failed to take into consideration relevant facts. The respondents submitted that under s 26(3) of the Trade Unions Act 1959 the DTU had a discretion to conduct a membership check by membership verification or by secret ballot and that the mode of membership verification was fair and permissible and was not unreasonable. In the course of the appeal it also came to light that the matter of the appellant's failure to accord recognition to the Union had been referred to the Minister, the third respondent, who had decided to accord recognition to the Union and served a notice on the appellant to this effect.

Held, dismissing the appeal with costs:

(1) The DTU had given sufficient reasons why the process of secret ballot was rejected when he stated that the verification method was 'more practical' and 'more orderly'. In the circumstances the first respondent could not be accused of non-divulgence or failing to provide reasons for a membership exercise by way of membership verification. Further, the DTU took into consideration the views of the appellant's employees who had rejected the process of secret ballot and had not acted contrary to the law. As such there was no flaw to be detected in the decision making process of the DTU and the appellant's appeal could be dismissed on this ground alone (see paras 17 & 21)

(2) Under the law, it was not for the DGIR or the DTU to decide whether to accord recognition to the Union. It was for the Minister or the appellant as the employer to decide whether or not to accord recognition. It was agreed by all the parties that the Union's claim for recognition was resolved by the Minister's decision to accord the Union recognition. This decision had yet to be set aside or quashed by a court of law and was therefore good and final. As such this application by the appellant was premature and academic (see para 26)

[Bahasa Malaysia summary

Perayu memiliki dan mengendalikan kolej persendirian di bawah nama Taylor's College dan mempunyai lebih kurang 208 orang kakitangan akademik. Pada 1 Mac 1999, responden keempat, suatu kesatuan pekerja-pekerja perayu yang telah menjadi ahli, ('Kesatuan tersebut') telah didaftarkan sebagai kesatuan pekerja. Melalui surat bertarikh 28 September 1999 perayu memaklumkan Ketua Pengarah Perhubungan Perusahaan ('KPPP'), responden kedua, bahawa perayu tidak dapat mengiktiraf Kesatuan tersebut. Perayu kemudiannya meminta KPPP, antara lain, untuk menentukan sama ada Kesatuan tersebut kompeten untuk mewakili pekerja-pekerja perayu. Pada 16 Disember 1999, KPPP meminta Pengarah Kesatuan Sekerja Selangor ('PKSS'), responden pertama, menyiasat kompetensi Kesatuan tersebut untuk mewakili pekerja-pekerja perayu. PKSS menjawab bahawa Kesatuan tersebut kompeten untuk mewakili pekerja-pekerjanya pada masa Kesatuan itu menuntut pengiktirafan daripada perayu. Pada 27 Mac 2000 perayu memohon satu undi sulit dijalankan oleh KPPP untuk mengesahkan sama ada Kesatuan tersebut mewakili majoriti pekerja-pekerja perayu. Kesatuan tersebut membantah permintaan perayu untuk semakan keahlian dilakukan menerusi undi sulit. KPPP menulis kepada PKSS dan mengarahkan semakan keahlian dijalankan menerusi pengesahan keahlian. Setelah menjalankan semakan keahlian, PKSS mengesahkan pada tarikh tuntutan pengiktirafan, responden keempat mewakili 71.51% daripada pekerja-pekerja. Tidak berpuas hati dengan cara pengesahan keahlian yang tidak dilakukan dengan cara undian rahsia, perayu memfailkan usul pemula terhadap responden-responden bagi suatu perintah certiorari di bawah A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk membatalkan keputusan PKSS. Permohonan perayu ditolak dan perayu merayu terhadap keputusan tersebut. Dalam rayuannya, perayu menghujah bahawa cara undi sulit lebih adil dan demokratik dan PKSS tidak mengguna pakai peruntukan perundangan berkenaan isu semakan keahlian dengan betul dan juga gagal memberikan alasan-alasan bagi menjalankan semakan keahlian tersebut menerusi cara pengesahan keahlian. Perayu selanjutnya menyatakan bahawa keputusan PKSS itu tidak berasas kerana gagal mengambilkira fakta-fakta yang relevan. Responden-responden pula mengatakan bahawa di bawah s 26(3) Akta Kesatuan Sekerja 1959 tersebut, PKSS mempunyai kuasa budi bicara sama ada untuk menjalankan semakan keahlian menerusi cara pengesahan keahlian mahupun menerusi undian rahsia dan juga cara pengesahan keahlian tersebut adalah adil dan dibenarkan dan munasabah. Dalam rintisan rayuan ini, telah difahami bahawa keengganan perayu mengiktiraf Kesatuan tersebut telah dirujuk kepada Menteri, responden ketiga, yang memutuskan untuk memberikan pengiktirafan kepada Kesatuan tersebut dan menyerahkan notis kepada perayu memberitahu pengiktirafan tersebut.

Diputuskan, menolak rayuan dengan kos:

(1) PKSS telah memberikan alasan yang mencukupi mengapa cara undian rahsia itu ditolak apabila dia menyatakan bahawa cara pengesahan lebih praktikal dan teratur. Dalam keadaan-keadaan ini, responden pertama tidak boleh dituduh tidak mendedahkan atau gagal memberi alasan-alasan mengapa cara pengesahan keahlian dilakukan bagi semakan keahlian. Lagi pula, PKSS mengambilkira pandangan-pandangan pekerja perayu yang menolak proses undi sulit dan juga tidak bertindak menyalahi undang-undang. Maka, tiada kesilapan yang boleh dikesan dalam proses PKSS membuat keputusan dan rayuan perayu boleh ditolak semata-mata atas alasan ini (lihat perenggan 17 & 21)

(2) Di bawah undang-undang, bukanlah KPPP atau PKSS yang harus memberi pengiktirafan kepada Kesatuan tersebut. Adalah menjadi tanggungjawab Menteri atau perayu sebagai majikan untuk memutuskan sama ada mahu mengiktiraf atau tidak. Adalah dipersetujui oleh kesemua pihak bahawa tuntutan pengiktirafan Kesatuan tersebut telah diselesaikan oleh keputusan Menteri yang memberikan pengiktirafan kepada Kesatuan tersebut. Keputusan ini masih belum diketepikan atau dibatalkan oleh mana-mana mahkamah dan oleh itu adalah muktamad. Maka, permohonan perayu ini adalah pramasa dan berbentuk akademik (lihat perenggan 26)]

Notes

For cases on certiorari, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 198–208.

For cases on recognition of trade union, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1659–1682.

Cases referred to

Associate Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223, CA (refd)

Australian Broadcasting Tribunal v Bond & Ors 94 ALR 11 (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481, CA (refd)

Kelab Lumba Kuda Perak v Menteri Sumber Manusia, Malaysia & Ors [2005] 5 MLJ 193, CA (distd)

Kennesion Brothers Sdn Bhd v Construction Workers Union [1989] 2 MLJ 419, SC (refd)

Marulee (M) Sdn Bhd v Menteri Sumber Manusia & Anor [2007] 6 MLJ 222; [2007] 5 CLJ 51, CA (refd)

Legislation referred to

Administrative Decisions (Judicial Review) Act 1977 [Australia]
Industrial Relations Act 1967 s 9, 9(5)
Rules of the High Court 1980 O 53
Trade Unions Act 1959 s 26(3)
Trade Unions Regulations 1959 reg 63

Appeal from: Originating Motion No MT3–21–26 of 2000 (High Court, Shah Alam)

Romesh Abraham (Faisal Moideen and Mathevi Balakrishnan with him) (Shook Lin & Bok) for the appellant.
Narkunavathy Sundareson (Azlina Mahmod with her) (Attorney General's Chambers) for the first to third respondents.
R Sivarasa (Daim & Gamany) for the fourth respondent.

Suriyadi JCA:

[1] This panel unanimously dismissed the appeal with costs and accordingly affirmed the order of the High Court. The deposit was ordered towards account of taxed costs.

[2] The facts of this appeal are as follows: The appellant ie Taylor's College Sdn Bhd had applied for an order of certiorari under O 53 of the Rules of the High Court 1980 to quash the decision made on 27 July 2000 by the Director General of Trade Unions, Malaysia (first respondent). The first respondent had decided to resolve the dispute over the recognition claim by the fourth respondent (the Union) through a membership verification as opposed to a secret ballot under s 26(3) of the Trade Unions Act 1959. This provision reads:

> (3) Where a trade union of workmen has served a claim for recognition under the Industrial Relations Act 1967, the Director General may, at the request of the Director General for Industrial Relations, carry out a membership check in such manner as may be prescribed by regulations in order to ascertain the percentage of workmen or any class of workmen, in respect of whom recognition is being sought, who are members of the union making the claim.

[3] There was nothing improper about this request for a claim of recognition under the Trade Unions Act 1959, read together with the Industrial Relations Act 1967 (the Act), as Parliament recognises the rights of employees to set up Unions, in order to help resolve problems arising out of any employer-employee relationship. This relationship is an integral part of human relations as it strikes a balance between the aspirations of employees

and the expectations of the management (*Malaysian Employment Laws* Vol 2 by MN D'Cruz). In order to concretise that relationship the abovementioned the Act was promulgated, with it as:

> An Act to provide for the regulation of the relations between employers and workmen and their trade unions and the prevention and settlement of any differences or disputes arising from their relationship and generally to deal with trade dispute and matters arising therefrom.

[4] This Act therefore deals with the process and recognition of Unions enroute towards any collective bargaining discussion and settlement between employees and the employer (*Industrial Relations in Malaysia* 3rd Ed by Dunston Ayadurai). The relevant provisions dealing with the recognition process are found in s 9 of the Act. More of this later.

[5] The appellant owns and operates a private college under the name of Taylor's College and employs approximately 208 academic staff. On 1 March 1999 the Union was registered as a trade union and accordingly had submitted to the appellant a claim for recognition vide a letter dated 28 September 1999. On 28 October 1999 the appellant informed the second respondent ie the Director General Industrial Relations, Malaysia (hereinafter referred to as the DGIR) that it could not accord recognition to the Union. It then requested the DGIR to determine whether the Union was competent to represent the employees of the appellant, whether the majority of its employees were members of the Union, and whether the employees fell within the scope of the representation of the Union. On 16 December 1999 the DGIR requested the first respondent to inquire on the competency of the Union to represent the employees of the appellant. The answer that came back was in the positive. On 29 January 2000, the DGIR informed the appellant that the Union was competent to represent the employees at the time when recognition was claimed. On 3 February 2000, the first respondent requested the appellant and the Union to furnish the lists of the appellant's employees and the list of the members of the Union. On 27 March 2000 the appellant requested the DGIR to conduct a membership check of the Union by way of a secret ballot as opposed to membership verification. The former mode was requested as it was asserted to be fairer and more democratic, in order to verify whether the Union actually represented the majority of the employees of the appellant.

[6] By way of letter dated 9 June 2000, the DGIR requested the first respondent to carry out a membership check of the members of the Union. In the same letter the DGIR notified the first respondent that the appellant had requested for the membership check to be conducted by way of secret ballot. Vide a letter dated 5 July 2000, the Union wrote to the first

respondent objecting to the request of the appellant for a membership check to be conducted by way of a secret ballot. The letter reads as follows:

> Pihak kami, dengan segala hormatnya, ingin mengemukakan pembantahan ke atas permohonan majikan agar pemeriksaan keahlian dijalankan secara undi sulit. Hampir 10 bulan sudah pun berlalu sejak tarikh tuntutan pengiktirafan, dan kelewatan ini akan membawa masalah-masalah yang sangat rumit untuk kesatuan kami dalam proses undi sulit.
>
> Untuk pengetahuan tuan terdapat begitu ramai (lebih 20 orang) para ahli akademik yang telah pun meletak jawatan sejak tarikh penuntutan pengiktirafan. Pemergian ahli-ahli ini merugikan kesatuan kami kerana semua di antara mereka adalah ahli kesatuan. Tambahan pula jumlah ahli yang telah meletak jawatan adalah amat besar dibandingkan dengan jumlah semua ahli akademik yang digaji oleh majikan pada masa tuntutan tersebut dibuat.
>
> Pada pendapat kami proses mengendalikan undi sulit adalah sangat susah kerana ahli-ahli yang telah meletak jawatan ini terpaksa pulang untuk mengundi di tempat bekerja yang lama. Perkara ini tidaklah mudah kerana mereka telah pun mendapat jawatan di institusi-institusi yang lain dan ada yang telah pun berpindah alamat. Tambahan juga ada di antara mereka yang telah berangkat ke luar negeri untuk melanjutkan pelajaran dan bermastautin.
>
> Ketidakhadiran bekas ahli-ahli akademik ini akan memberi satu halangan yang terlalu sukar diatasi oleh pihak kesatuan kerana mereka yang tidak hadir mengundi akan dikira telah menolak tuntutan pengiktirafan kesatuan.
>
> Pihak kami ingin memohon supaya proses pemeriksaan keahlian diteruskan dengan menggunakan kaedah 'verification exercise' yang sedia ada.
>
> Pihak kami juga ingin memohon kepada pihak tuan supaya penyelesaian tuntutan pengiktirafan ini tidaklah dilambatkan lagi. Pihak kami sedia membantu dalam mempercepatkan proses penyelesaian tersebut.
>
> Terima kasih terhadap segala pertimbangan dan budi bicara pihak tuan.

[7] On 27 July 2000 the first respondent wrote to the Director of Trade Union Selangor of the membership check to be conducted by way of membership verification. This direction is not without authority. See reg 63 of the Trade Unions Act 1959 (Act 262) & Regulations, which reads:

> 63 Director General may notify that the membership check shall be conducted.
>
> (1) For the purpose of conducting a membership check under s 26(3) of the Act, the Director General may, by notice in writing, notify the trade union of workmen making the claim for recognition that a membership verification exercise shall be conducted, or notify the employer upon whom the claim for recognition has been served that a secret ballot shall be taken, as the case may be, in accordance with such directions as the Director general may specify in such notice.

(2) A copy of the notice under para (1) shall be sent to the employer or the trade union of workmen concerned, as the case may be.

[8] It is accepted that a membership verification exercise is to determine how representative a union is whilst the secret ballot is to determine the percentage of employees who want the union to represent them for collective bargaining purposes. The reasons aside why the respondents preferred a membership verification exercise, recourse to the secret ballot method takes place only in exceptional circumstances eg when the employer is suspected to be hostile to unions or unionism (*Industrial Relations in Malaysia, Law and Practice* by Dunston Ayadurai (3rd Ed) p 119). The appellant here had insisted on a secret ballot method on the belief that this process would be fairer and democratic. Being dissatisfied with the rejection of its demand the appellant thus filed an originating motion for an order of certiorari on 20 September 2000. The application was dismissed on 13 March 2004 hence this appeal.

[9] The appellant at the High Court had contended that the first respondent had exceeded his jurisdiction, because in deciding in the manner he did, he had in fact considered irrelevant issues before him. The appellant believed that the membership check, by way of a secret ballot, was the only way to verify that the workers were informed of a recognition claim and that they have the right to choose whether to signify their membership to support the claim for recognition or otherwise. It also canvassed that in arriving at that decision, the first respondent had failed to take into consideration relevant and germane facts. The decision of the first respondent thus was unreasonable.

[10] The respondents submitted that s 26(3) of the Act empowers the DGIR to request the first respondent to carry out a membership check, for the purpose of ascertaining the percentage of the workmen in respect of whom recognition was being sought, and of members of the union who were making the claim. It was also canvassed that the first respondent has a discretion on how to conduct a membership check, namely by membership verification or by secret ballot. The latter explained in his affidavit that the mode of membership verification was fair and permissible and was not unreasonable. It was not 'so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at such decision' (*Associate Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223).

[11] As stated above the application for the certiorari was dismissed and an

appeal was forthwith filed. The summary of the memorandum of appeal filed by the appellant reads as follows:

(1) The decision of the first respondent was contrary to the aim, object and policy of the Act.

(2) The first respondent failed to establish that the majority of employees in the appellant's establishment supported the Union's claim for recognition.

(3) The reason provided by the first respondent to proceed by way of membership verification as being 'more practical' and 'more orderly' amounted to extraneous and irrelevant considerations.

(4) The first respondent did not give sufficient reasons why the process of secret ballot was rejected.

[12] Before us, counsel for the appellant restated their grounds of appeal, by stating that they wanted to pursue its ground of appeal in the following manner:

The first appellant did not act lawfully by way of membership verification because:

(a) it did not direct itself properly to legal provisions pertaining to the issue of membership check and the objective thereof;

(b) it failed to provide reasons for a membership exercise by way of membership verification; and

(c) discrepancies in membership verification process render the decision unsafe and unreliable.

[13] In the course of the hearing this panel arrived at certain findings. To begin with a claim for recognition as a union was served on the appellant via letter dated 28 September 1999 by the Union. The appellant then sought the assistance of the DGIR to ascertain the Union's competency to represent its employees. The DGIR then referred the matter to the first respondent for his decision on the Union's competency and then subsequently for a membership check. It was revealed that the Union was indeed competent to represent the employees. The appellant then requested for a membership check of the Union be conducted by way of a secret ballot. Even at this early stage we saw no error having been committed by any of the respondents be they as regards the provisions provided for in the Act or the Trade Unions Act 1959.

[14] The Union opposed any secret ballot whilst the first respondent opined that it was more practical to conduct a membership check through a verification exercise, which was carried out eventually on 16 August 2000.

The first respondent also confirmed, as at the date of the claim for recognition, that the fourth respondent represented 71.51% of the employees.

[15] In the course of the appeal, parties brought to our notice that upon being notified of the results of the first respondent's membership check, the appellant had refused to accord recognition on the fourth respondent. The matter was referred to the third respondent, the Minister, who then decided to accord recognition on the Union and served the prescribed notice dated 12 August 2005 on the appellant. The appellant, being dissatisfied with the Minister's decision, had commenced a judicial review application of that decision vide MT1–25–65 of 2005 to quash the same.

[16] We were aware that the dissatisfaction of the appellant was primarily directed at the first respondent, as per the grounds in the memorandum of appeal, albeit minor changes before us. Whether this was a tactical ploy or not, the evidence showed that 71.51% of the appellant's employees supported the Union's claim for recognition, a percentage that was incontrovertible. With more than half of the total employee population wanting to have the Union recognised the route towards recognition should have been smooth sailing. Unfortunately the appellant resisted all the way. Harun Hashim FJ as he then was when meting down an award, had occasion to state:

> The law and procedure on Union recognition is perhaps not generally known. A trade union of workmen may organise the employees of a company who are eligible for membership in accordance with the rules of the trade union. *In practice, when 51% or more of the employees join the trade union, it may claim recognition from the company*. On receipt of the claim, the company may either accord recognition or apply to the Director-General of Industrial Relations for a membership check. This check is carried out by the Registrar of Trade Unions and for purposes of determining whether the majority of employees of the company are members of the union, the date of the claim for recognition is the date used. It does not matter if at the time of the check, the employees have resigned from the union or that more employees have been employed by the company. If after the check, the Company is still not satisfied, it may appeal to the Minister. *The decision of the Minister is final*. Once recognition has been accorded either by the company or by the decision of the minister, the recognition stands for as long as the unions exists even though only one employee of the company is left as a member of the union. (Emphasis added.)
>
> (IC Award 173/1983, Harun J (as he then was).

[17] It is incorrect to state that the first respondent did not give sufficient reasons why the process of secret ballot was rejected when he clearly stated that the verification method was 'more practical' and 'more orderly'. Further, the employees through the Union had rejected the process of secret ballot.

A How could the first respondent thus be said to have acted in a manner contrary to the aim, object and policy of the Act when the action of the first respondent was never arbitrary and had taken into consideration the views of the very party who would be affected by the outcome viz the employees?

B

[18] In the course the appeal the appellant brought to our attention the case of *Kelab Lumba Kuda Perak v Menteri Sumber Manusia, Malaysia & Ors* [2005] 5 MLJ 193. The facts are as follows:

C

> The second respondent, a trade union, sought recognition from the appellant in respect of employees of the appellant who had become its members. The appellant requested a secret ballot to be taken to establish whether a majority of its employees were members of the second respondent at the material time. The Director of Trade Union ('DGTU') however informed the appellant and the second
>
> D respondent that a membership verification exercise would be undertaken instead to ascertain the percentage of members in the second respondent. No reasons were given as to why a secret ballot was not carried out. Pursuant to the verification exercise, the DGIR advised the appellant to accord recognition to the second respondent. The first respondent ordered the same. The High Court dismissed the
>
> E appellant's application for order of certiorari to quash the decision of the first respondent ordering the appellant to accord recognition to the second respondent as a trade union. The appellant relied on the following grounds in seeking an order of certiorari to quash the decision of the first respondent: (1) illegal exclusion of temporary employees from scope of representation of the second respondent; (2) breach of the principles of natural justice and procedural unfairness; (3) the
>
> F deprivation of the appellant's legitimate expectation; and (4) perverse and unreasonable exercise of discretion.

[19] At the end of the hearing the appeal was allowed. The order of
G recognition was quashed. In the course of the hearing the Court of Appeal had occasion to state.

> … A secret ballot allows members to exercise their freedom of choice as to whether they wish to assign their bargaining power and freedom of contract of the Union.
>
> H In contrast, a verification exercise merely involves an examination of the records furnished by the Trade Union. More importantly a verification exercise would not be able to address the issues which had been raised by the appellant in its letter of 14 March 1997 to the DGTU to ascertain the authenticity and voluntariness of the signatories in the membership rolls. The veracity of membership check by secret ballot has been expressly tested and sanctioned by the Court of Appeal in
>
> I *Minister of Human Resources v National Union of Hotel, Bar and Restaurant Workers Semenanjung Malaysia*, where in the court confirmed that a membership check conducted by secret ballot does not produce an unfair result. In addition, the court also held that the membership check by secret ballot was perfectly valid and not ultra vires the Trade Union Act 1959 ….

… It is our view that it is of paramount importance to ensure that all the affected employees of the appellant have a right to state their choice through secret ballot as to whether they elect to be members of the second respondent and therefore assign their contracting right to the second respondent. This right of choice is preserved under the provision of reg 67 of the Trade Union Regulations 1959, which states as follows:

> All workmen or any class of workmen, in respect of whom recognition is being sought who are in the employment of the employer on the date of claim *shall be entitled to vote in a secret ballot*. (Emphasis added.)

[20] It is obvious that the above case is distinguishable with the current case. In the above case the employees wanted verification carried out by secret ballot with the court being equally sympathetic to that wish. In this case the situation is in the reverse, with the employees not wanting a secret ballot as per the reasons elucidated in its letter. Indeed statutorily all workmen or any class of workmen, in respect of whom recognition is being sought shall be entitled to vote in a secret ballot, though not necessarily must vote by secret ballot. An employee may even refuse to vote if he so wishes. With the wishes of the employees here opting for membership verification the above case has minor influence over this appeal.

[21] Prior to arriving at the decision of the membership verification, matters like practicality and orderliness were factored in by the first respondent; and these reasons were made known to the appellant. That being so the first respondent can never be accused of non-divulgence or having no good reasons when arriving at that decision (*Hong Leong Equipment Sdn Bhd v Liew Fook Chuan* [1996] 1 MLJ 481). In conclusion, it was thus our factual finding that there was absolutely no flaw that could be detected in the decision making process, or for that matter the reasons leading to the decision of the first respondent. The appeal could be dismissed with costs just on this ground.

[22] Apart from the reason as prognosed above, this appeal could also be dismissed on the ground that the judicial review application by the appellant merely served to fragment the decision making process and hence premature. We were not convinced that a 'decision' existed here that was amenable to judicial review in the context of judicial or administrative proceedings. The decision of the first respondent could not be said to have effectively disposed of the matter whereby its decision was final and determinative of the issue under consideration.

[23] The High Court in *Australian Broadcasting Tribunal v Bond & Ors* 94

ALR 11 when considering whether a decision was amenable to judicial review under the provisions of the Administrative Decisions (Judicial Review) Act 1977 had occasion to remark:

> … On the one hand, the purposes … are to allow persons aggrieved by the administrative decision-making processes of government a convenient and effective means of redress and to enhance those processes. On the other hand, in so far as the ambit of the concept of 'decision' is extended, there is a greater risk that the efficient administration of government will be impaired … To interpret 'decision' in a way that would involve a departure from the quality of finality would lead to fragmentation of the processes of administrative decision-making and set at risk the efficiency of the administrative process.

[24] To reiterate the matter before us, the dispute between the parties before us relate to a claim of recognition, with the first respondent's decision merely determining the question of the Union's competence to represent the appellant's employees. Section 9 of the Act clearly specifies that the power to accord recognition rest on the Minister. Section 9 reads:

> 9(1) No trade union of workmen the majority of whose membership consists of workmen who are not employed in any of the following capacities that is to say —
>
> (a) managerial capacity;
>
> (b) executive capacity;
>
> (c) confidential capacity; or
>
> (d) security capacity,
>
> may seek recognition or serve an invitation under s 13 in respect of workmen employed in any of the abovementioned capacities.
>
> (1A) Any dispute arising at any time, whether before or after recognition has been accorded, as to whether any workman or workmen are employed in a managerial, executive, confidential or security capacity may be referred to the Director General by a trade union of workmen or by an employer or by a trade union of employers.
>
> (2) A trade union of workmen may serve on an employer or on a trade union of employers in writing in the prescribed form a claim for recognition in respect of the workmen or any class of workmen employed by such employer or by the members of such trade union of employers.
>
> (3) An employer or a trade union of employers upon whom a claim for recognition has been served shall, within twenty-one days after the service of the claim —

(a) accord recognition; or

(b) if recognition is not accorded, notify the trade union of workmen concerned in writing the grounds for not according recognition; or

(c) apply to the Director General to ascertain whether the workmen in respect of whom recognition is being sought are members of the trade union of workmen concerned and give a written notice of such application to such trade union of workmen.

(4) Where the trade union of workmen concerned receives a notification under subsection (3)(b), or where the employer or trade union of employers concerned fails to comply with subsection (3), the trade union of workmen may report the matter in writing to the Director General.

(4A) The Director General, upon receipt of a reference under subsection (1A), or an application under subsection (3)(c), or a report under subsection (4) may take such steps or make such enquires as he may consider necessary or expedient to resolve the matter.

(4B) For the purpose of carrying out his functions under subsection (4A) the Director General —

(a) shall have the power to require the trade union of workmen, the employer, or the trade union of employers concerned to furnish such information as he may consider necessary or relevant; and

(b) may refer to the Director General of Trade Unions for his decision any question on the competence of the trade union of workmen concerned to represent any workmen or class of workmen in respect of whom recognition is sought to be accorded, and the performance of duties and functions by the Director General of Trade Unions under this paragraph shall be deemed to be a performance of his duties and functions under the written law relating to the registration of trade unions.

(4C) Where the matter is not resolved under subsection (4A) the Director General shall notify the Minister.

(5) Upon receipt of a notification under subsection (4C) the Minister shall give his decision thereon; where the Minister decides that recognition is to be accorded, such recognition shall be deemed to be accorded by the employer or trade union of employers concerned, as the case may be, as from such date as the Minister may specify; a decision of the Minister under this subsection may include a decision as to who are workmen employed in a managerial, executive, confidential or security capacity.

(6) *A decision of the Minister under subsection (5) shall be final and shall not be questioned in any court* (Emphasis added.)

[25] In *Marulee (M) Sdn Bhd v Menteri Sumber Manusia & Anor* [2007] 6 MLJ 222; [2007] 5 CLJ 51 Zaleha Zahari JCA had occasion to hold:

> … The law does not require the DGIR to make a 'decision' on the matter. It is not for the DGIR to decide whether or not to accord recognition. The power to accord recognition is only given to the employer under s 9(3)(a), or the Minister under s 9(5). The most that the DGIR can do in resolving the matter under s 9(4A), is to advise the employer to accord recognition, and if the matter is not resolved, to then invoke s 9(5) of the Act and refer the dispute to the Minister for decision.

[26] Likewise here if is not for the first respondent to accord recognition. It was agreed by all parties that the Union's claim for recognition was resolved by the Minister's decision of 12 August 2005 when it was accorded recognition. Despite the ouster clause of s 9(5) of the Act a Minister's decision may still be liable to be set aside if it contains errors of law that goes to jurisdiction. Only a court may quash the Minister's decision (or for that matter an employer's decision) as there are no provisions in the Act enabling any of them to withdraw or revoke recognition (*Kennesion Brothers Sdn Bhd v Construction Workers Union* [1989] 2 MLJ 419). In the circumstances of the case, as the Minister's decision had yet to be set aside or quashed by a court of law, his order therefore was good and final (*Malaysian Employment Laws, Industrial Relations Act 1967* (*With Annotations and Court Cases* by MN D' Cruz, at p 55). With the substratum of the appeal now eliminated the matter for consideration before us had become academic. Based on any of the following reasons that:

(i) the first respondent never acted contrary to the law;

(ii) the application was premature; and

(iii) the matter had become academic when the Minister meted the decision of 12 August 2005, which accorded recognition on the Union.

[27] The appeal was dismissed with costs. The High Court's order was affirmed and the deposit accordingly ordered towards account of taxed costs.

Appeal dismissed with costs.

Reported by K Nesan